

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's)	
Own Motion, directing CableMax)	
Communications to show cause why it)	Case No. U-16182
should not be found in violation of the)	
Uniform Video Services Local Franchise)	
Act, 2006 PA 480, MCL 484.3301 <i>et seq.</i>)	

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on July 22, 2010.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before August 12, 2010, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before August 26, 2010. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for

Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman
Administrative Law Judge

July 22, 2010
Lansing, Michigan
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PROPOSAL FOR DECISION

I.

PROCEDURAL HISTORY

This case was initiated by the Commission's January 11, 2010 show cause order directing CableMax Communications (Cable Max) to show cause why it should not be found in violation of the Uniform Video Services Local Franchise Act, 2006 PA 480, as amended by 2009 PA 4, MCL 484.3301 *et seq.* The order indicated that Staff had received customer complaints including complaints that 50-100% of services were removed without notification, that attempts to contact the company were unsuccessful, and that customers had paid for services no longer being received. The order identified seven communities for which CableMax apparently lacked a franchise: Brutus, Fine Lake, Akron/Fairgrove, Unionville, Mesick, Kaleva and Nashville. The order thus provided:

Based on customer complaints, as well as information gained by the Staff's contacting communities in which CableMax was operating, the Staff has the following concerns regarding potential violations of the Act:

- That CableMax may be in violation of MCL 484.3302(2) due to its alleged failure to enter into Uniform Video Services Local Franchise Agreements before operating video service in Michigan.
- That CableMax may be in violation of MCL 484.3303(1) to MCL 484.3303(6) for allegedly failing to enter into Uniform Video Service Local Franchise Agreements and by allegedly failing to provide notice to local communities of any changes that may be occurring.
- That CableMax may be in violation of MCL 484.3306(1) which pertains to the designation and payment of franchise fees.
- That CableMax may be in violation of MCL 484.3310, which pertains to customer protections and dispute resolution procedures.
- That CableMax may be in violation of MCL 484.3310(5)(a), which requires a provider to respond to an informal customer complaint in 10 days.

Therefore, the Commission finds that it should order CableMax to show cause why it should not be found in violation of the above-described provisions of the Act.

The Commission directed CableMax to file a response by February 12, 2010, to explain in the response whether it entered into franchise agreements as required by the Act, and to provide copies to Staff of any such agreements by February 26, 2010. The Commission further directed CableMax to appear with counsel at a prehearing conference on March 9, 2010.

On February 26, 2010, CableMax filed a set of documents. On March 4, 2010, CableMax filed a verified response to the show cause order. On March 1, 2010, the Village of Mesick filed a petition to intervene.

At the prehearing conference, CableMax appeared, represented by counsel as directed by the Commission. Staff and the Village of Mesick also attended, and the Village was granted intervention without objection. A resident of Battle Creek, Earl R. Douglas, also appeared and made a comment on the record. Mr. Douglas expressed his concern with the location of certain equipment he believed was owned by CableMax.

CableMax acknowledged at the prehearing conference that it had not complied with the Executive Secretary's instructions regarding notice, explaining that the company was no longer operating and lacked assets. Following a discussion with Staff, CableMax agreed to provide notice by mail to its customers.¹ A second prehearing conference was scheduled to provide for additional comments or interventions, and testimony and discovery deadlines were also established.

CableMax filed a proof of mailing on March 22, 2010, indicating it mailed the notice as required. At the second prehearing conference on April 6, 2010, no additional interventions were received and no members of the public asked to make statements for the record.

Following the established schedule, on March 23, 2010, Staff filed testimony from Ryan McAnany, Video Franchise Specialist for the Commission, and CableMax filed testimony from Matthew Killinger, one of the members of CableMax. The evidentiary hearing, originally scheduled for April 27, 2010, was rescheduled for May 26, 2010 at

¹ See Tr 5-10.

the request of the parties, to provide time for settlement discussions. Staff and CableMax appeared at the hearing and agreed to bind in the testimony of both witnesses without the need for them to appear, and to admit into evidence Exhibit S-1.² Further, the parties stipulated to additional facts. The Village of Mesick did not attend the hearing.

A briefing schedule was established calling for Staff to file a brief by June 16, 2010 and CableMax to file a reply brief by June 30, 2010. Staff filed a brief, but CableMax did not file a response. In its brief, Staff asks that the Commission find CableMax in violation of the Uniform Video Services Franchise Act, and exercise its authority under MCL 484.3314 to impose penalties and remedies.

The record evidence and the Staff's recommendations are discussed below.

II.

DISCUSSION

The Uniform Video Services Franchise Act, 2006 PA 480, MCL 484.3301 *et seq.*, became effective January 1, 2007, with the amendments adopted by 2009 PA 4 taking effect April 2, 2009. Mr. McAnany explained the basic requirements of the Act.³

A key requirement is that video services providers obtain a franchise agreement from each local unit of government or "franchising entity" before providing service within that community.⁴ The Act directs the Commission to establish a form for the uniform

² Based on the parties' agreement to bind in the testimony, CableMax's attorney participated in the hearing by telephone.

³ Mr. McAnany's testimony is transcribed at Tr 24-35.

⁴ See MCL 484.3302(2) and 484.3303(1).

video services local franchise agreement, consistent with the provisions of the Act.⁵ The Commission established this form in its January 30, 2007 order in Case No. U-15169. The Act specifies a process for providers to obtain a franchise, with time requirements provided to facilitate expeditious completion of franchise agreements. In the event a franchising entity fails to respond timely to a request for an agreement, the franchise agreement is considered approved. The instructions for the uniform video services local franchise agreement established by the Commission direct providers to complete Attachment 3 to the franchise agreement to notify both the franchising entity and the Commission of this approval.⁶

Another key requirement is that video service providers must notify the franchising entity in order to terminate the franchise agreement, to modify the video service area footprint, or to change any of the information in the franchise agreement.⁷ Attachment 2 of the uniform video services local franchise agreement provides a form for providers to indicate such changes.

Additionally, the Act as amended provides a dispute resolution process for customer complaints. Once complaints reach the Commission, the Commission is directed to attempt informal resolution of the complaint, and a provider is required to respond to a complaint forwarded by the Commission within 10 days.⁸

⁵ See MCL 484.3302(1) and 484.3303.

⁶ The form was revised slightly by the Commission's April 16, 2009 order in the same docket to reflect amendments to the Act under 2009 PA 4, effective April 2, 2009.

⁷ See MCL 484.3303(5) and (6).

⁸ See MCL 484.3310(5)(a).

Mr. McAnany testified that the Commission maintains a webpage for video service providers that contains all this information, including the uniform video services local franchise agreement and instructions.

He also described events leading up to the issuance of the show cause order. He explained that Staff began receiving a high number of complaints from customers and franchising entities about CableMax on December 7, 2009. When Staff forwarded the complaints to the contact person Staff had been dealing with for the company, Staff discovered the person no longer represented the company. Staff attempted to contact company officials, but found the phone numbers for the company no longer in service. As a result, Staff was no longer able to forward complaints to the company. Mr. McAnany testified that CableMax never contacted the Commission to inform the Commission that CableMax was going out of business or removing channels from its line-up.

Addressing the company's February 26, 2010 and March 4, 2010 filings, Mr. McAnany testified that the filings were not made by the dates specified in the Commission's show cause order. He further testified that franchise documents submitted for Akron and Unionville were not complete; that CableMax did not provide copies of agreements with Brutus or Maple River Township, or copies of Attachment 3, notwithstanding its statement that it sent copies of the agreements to those franchising entities; and that CableMax did not represent that it had agreements with Fine Lake, Mesick, Kaleva or Nashville or provide copies of any such agreements, although it acknowledged providing service in those communities.

Mr. McAnany also testified that CableMax had not provided Staff or the Commission with copies of any notices provided to customers, to substantiate that notice was given and how it was given.

Mr. Killinger testified that that he and Michael Wesley are the two members of CableMax Communications, LLC.⁹ He explained that CableMax entered into two purchase agreements with Pine River Cable. In the first transaction, CableMax purchased cable systems in Brutus, Akron-Fairgrove, and Unionville. In the second transaction, CableMax purchased cable systems in Nashville, Fine Lake, Mesick and Kaleva.

Mr. Killinger further testified that at the time of the purchases, he and Mr. Wesley believed they were purchasing whatever licensing and permits were needed to operate the systems. Before completing payments for the second transaction, CableMax discovered that it did not own the cable system in Brutus. CableMax also discovered that the numbers of customers were significantly less than the purchase called for, and it decided to shut down operations in Mesick and Kaleva because they were not worth operating.

He testified that neither he nor Mr. Wesley were aware of the uniform franchise agreement requirement. Once they became aware, a couple of months after the purchases, they made efforts to get franchise agreements with the communities: Brutus never responded to the agreement CableMax sent; Unionville responded that the agreement it received was incomplete, and CableMax never sent agreements to

⁹ Mr. Killinger's testimony is transcribed at Tr 38-43.

Nashville, Fine Lake, Mesick and Kaleva as the company decided it was not worth operating and was shutting down.

Mr. Killinger testified Mesick and Kaleva were given 30-days' notice of the shut down, while in other communities, notice was only given to customers through the TV programming. By December 2009, CableMax was no longer providing service.

Mr. Killinger also testified that the company had a problem accessing its computer records, indicating that a contractor hired to do billing for the company continued to hold the company's computer records after she was discharged. At the time Mr. Killinger prepared his testimony, he believed that only a few customers had prepaid for service and were thus owed refunds. Mr. McAnany's prefiled testimony indicated that Staff was not certain as to the number of customers affected. At the hearing, however, CableMax and Staff stipulated that the company owed 87 customers a total of \$3,952.50.¹⁰

Staff's brief argues that the record evidence demonstrates that CableMax has violated provisions of the Act, including MCL 484.3302(2) and 484.3303(3), requiring franchise agreements, MCL 484.3303(5) and (6), requiring notices of termination, and MCL 484.3310(5)(a), requiring responses to customer complaints within 10 days. Staff seeks fines under MCL 484.3314 of \$500 each for each of 115 identified violations, for a total of \$57,500, and seeks other relief. While the Commission's order also identified potential violations of MCL 484.3306, requiring the payment of fees, Staff's brief indicates that it finds the record evidence inconclusive, and is not seeking any relief

¹⁰ See Tr 22, 36. Staff was able to assist the company to obtain some of its records.

related to violations of this section. As noted above, CableMax did not file a responsive brief.

Findings regarding the specific violations identified by Staff are discussed in section A below; the penalty recommendations and other requested relief are discussed in section B.

A. Violations of the Uniform Video Services Local Franchise Act

1. Franchise Agreement Provisions

Section 2 of the Act, MCL 484.3302(2) provides:

Except as otherwise provided by this act, a person shall not provide video services in any local unit of government without first obtaining a uniform video services local franchise as provided under section 3.

Section 3 of the Act, MCL 484.3303, provides in pertinent part:

Before offering video services within the boundaries of a local unit of government the video provider shall enter into or possess a franchise agreement with the local unit of government as required by this act.

The Commission's show cause order clearly directed CableMax to produce any franchise agreements existing with the seven identified communities. Mr. McAnany testified that the documents produced by CableMax were not valid, and CableMax acknowledged that the company did not have uniform local franchise agreements with any of the communities when it began operations, although it attempted to obtain some of the necessary agreements after it began providing service.¹¹ Mr. Killinger testified that it sent agreements to Unionville, Akron and Brutus, but Unionville sent the agreement back as incomplete. Mr. McAnany testified that the Akron document was not valid because it did not follow the standardized form required by section 2(1) of the Act,

¹¹ See McAnany, Tr 32-33; Killinger, Tr 40; March 4, 2010 Verified Response at paragraph 10.

MCL 484.3302(1). As to Brutus, Mr. Killinger testified that CableMax sent the agreement to Brutus and did not hear back, and a certified mail receipt was provided in the company's documents. Mr. McAnany testified, however, that CableMax had not produced a copy of the agreement, and also had not prepared and submitted Attachment 3, which is required to memorialize an agreement that is deemed approved by operation of section 3(3) of the Act, MCL 484.3303(3).

Based on this information, this PFD concludes that CableMax provided service in the seven communities without valid franchise agreements, in violation of MCL 484.3302(2) and 484.3303(1). Further, this PFD finds that CableMax did not subsequently obtain valid franchise agreements to provide service in any of the seven communities.

Staff also points to the termination and modification requirements of the Act.

MCL 484.3303(5) and (6) provide as follows:

(5) The uniform video franchise agreement issued by a franchising entity may be terminated or the video service footprint may be modified, except as provided under section 9,¹² by the provider by submitting notice to the franchising entity.

(6) If any of the information contained in the franchise agreement changes, the provider shall timely notify the franchising entity.

Staff's investigation, contacting communities prior to the show cause order, indicated that the franchising entities had not been informed of the termination of service.

Mr. Killinger testified that CableMax only notified Mesick and Kaleva directly. Since the statutory obligations to provide notice of changes, modifications and termination only arise once a valid franchise agreement exists, and since this PFD concludes that

¹² Section 9, MCL 484.3309, requires service to be provided in a nondiscriminatory manner.

CableMax did not have valid franchise agreements, it appears moot to consider whether CableMax violated these provisions. If the Commission were to find that CableMax had valid franchise agreements in Brutus or in Akron, however, then the record establishes that CableMax violated the notice requirements of section 3 (5) and (6), MCL 484.3303(5) and (6), by not providing notice of the termination of service to those communities.

Reasonably recommending that violations of MCL 484.3302(2) and 3303(1) be combined with violations of MCL 484.3303(5) and (6) in counting violations, Staff identifies seven violations attributable to the company's failure to have valid franchises and to notify local communities of the termination of service. This PFD accordingly finds seven violations of the Act attributable to CableMax's failure to have valid franchises and to notify local communities of the termination of service.

2. Dispute Resolution Provisions

Staff's brief asks the Commission to find 21 violations of section 10(5)(a), MCL 484.3310(5)(a), and 87 violations of "the customer protections and dispute resolution procedures" of section 10, MCL 484.3310 generally. Starting with section 10(5) of the Act, it provides in context as follows:

A complaint filed [with the Commission] involving a dispute between a customer and a provider shall be handled by the commission in the following manner:

(a) An attempt to resolve the dispute shall first be made through an informal resolution process. Upon receiving a complaint, the commission shall forward the complaint to the provider and attempt to informally mediate a resolution. **The provider shall have 10 business days to respond and offer a resolution.** If the dispute cannot be resolved through the informal process, the customer can file a formal complaint under subdivision (b). [Emphasis added].

Thus, a provider is required to respond to a complaint forwarded by the Commission within 10 days.

Mr. McAnany testified to numerous Staff efforts to transmit the 21 complaints it received to the company for a response. First, Staff sent six complaints to the person designated by the company to receive them, only to find out this person no longer represented the company. Second, Staff made numerous efforts to contact the company, only to determine that the company had discontinued phone service at both its locations. Since Staff did everything possible to let the company know about the complaints, it is reasonable to conclude that the company failed to meet its obligation to respond within 10 days to these complaints. This PFD thus finds that CableMax failed to respond within 10 days to the 21 complaints received by Staff and listed in Exhibit S-1, which should be considered 21 separate violations of section 10(5)(a).

Staff also counts 87 violations of the Act with regard to the 87 customers who are owed a total of \$3,952.50 for services they paid for in advance and did not receive. Staff's brief indicates only: "In addition, Staff later became aware of an additional 87 customers who are owed money." Staff does not tie CableMax's failure to make proper refunds to these 87 customers to any specific provision of section 10 of the Act. It may be that failure to refund money to customers when it is owed is a violation of the Act, but Staff has not explained its theory.

Section 10(1) of the Act prohibits statements or representations that are false or misleading, charges for services that are not affirmatively ordered, charges for services after the date of customer cancelation, and coercion or duress in sales presentations.

Section 10(2) of the Act requires each provider to maintain a dispute resolution process

for customers and to maintain a local or toll-free telephone number for customer service contact. Section 10(3) of the Act requires each provider to notify its customers at least annually of the dispute resolution process. Section 10(4), insofar as it speaks to the provider's obligations, addresses dispute resolution and requires the provider to provide a customer with the Commission's phone number and website. As discussed above, section 10(5)(a) requires a provider to respond to the Commission within 10 days of after a complaint is forwarded by the Commission and to offer a resolution. Some of these customers may be counted in the list of 21 customers who filed complaints with the Commission, but Staff does not indicate whether any of these customers filed a complaint with the Commission, so section 10(5)(a) does not seem applicable. And Section 10(6) addresses disputes between providers and franchising entities, rather than customers.

Since Staff has not traced a connection between the 87 customers owed money and the requirements of section 10, this PFD does not recommend the Commission find that each customer represents an additional violation of that section of the Act.

Reviewing the provisions of section 10, however, it is clear that CableMax failed to have an established dispute resolution process and failed to maintain a phone number for customer contacts as required by section 10(2). On this basis, this PFD recommends that the Commission find two additional violations of the Act.

B. Relief

MCL 484.3314 gives the Commission authority to order remedies and penalties for violations of the Act, as follows:

(1) After notice and hearing, if the commission finds that a person has violated this act, the commission shall order remedies and penalties to protect and make whole persons who have suffered damages as a result of the violation, including, but not limited to, 1 or more of the following:

(a) Except as otherwise provided under subdivision (b), order the person to pay a fine for the first offense of not less than \$1,000.00 or more than \$20,000.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$2,000.00 or more than \$40,000.00.

(b) If the video service provider has less than 250,000 telecommunication access lines in this state, order the person to pay a fine for the first offense of not less than \$200.00 or more than \$500.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$500.00. For a third and any subsequent offense, the commission shall order the person to pay a fine of not less than \$500.00 or more than \$1,000.00.

(c) If the person has received a uniform video service local franchise, revoke the franchise.

(d) Issue cease and desist orders.

Subsection (2) of section 14, MCL 484.3314(2), provides an exception to the fine provisions for an “unintentional and bona fide error”. The fines requested by Staff are discussed in subsection 1 below; the other relief is discussed in subsection 2.

1. Fines

Staff seeks fines totaling \$57,500 for what it counts as 115 violations of the Act, with a provision for the fines to be reduced if CableMax provides proof that it has refunded the full \$3,952.50 owed to customers.

Staff recommends a penalty of \$500 for each violation, recognizing that the company had under 200 customers and thus falls within MCL 484.3314(1)(b). As explained above, this PFD found that CableMax violated MCL 484.3302(2) and

484.3303(1) by providing video service in seven communities without having valid franchise agreements in place. Staff reasonably recommends a fine of \$500 for each of the seven violations for a total of \$3,500.

Staff also seeks a fine for what it counts as 108 violations of section 10 of the Act, MCL 484.3310. Consistent with the recommendation in this PFD that each of the 21 customer complaints received by Staff should be considered a separate violation of section 10(5)(a), MCL 484.3310(5)(a), this PFD recommends an additional fine of \$500 for each of these violations, for an additional total of \$10,500.

As explained above, this PFD rejected Staff's claim that CableMax committed a separate violation of section 10 of the Act for each customer it failed to repay.

Consistent with the recommendation in this PFD that the Commission instead find two violations of section 10(2) of the Act, MCL 484.3310(2), this PFD recommends an additional fine of \$500 for each of the two violations, for an additional total of \$1,000.

Therefore, this PFD recommends a total fine of \$15,000 under section 14(1)(b). And consistent in part with Staff's recommendation that the fine be reduced if CableMax makes refunds to the 87 customers within 30 days, this PFD recommends that if such refunds are made, the fine should be reduced to \$14,000.

2. Other Relief

Staff also seeks other relief, including a cease and desist order, revocation of any existing franchises, and relief barring Mr. Killinger and Michael Wesley from operating another cable company in Michigan.

a. Franchises

As explained above, this PFD finds that CableMax does not have valid franchises for the seven communities identified in the Commission's show cause order. CableMax has also indicated it is no longer providing video services in Michigan. Therefore, to avoid any confusion regarding existing franchise documents, this PFD recommends that any franchises CableMax has in Michigan communities be expressly revoked under MCL 484.3314(1)(c).

b. Cease and Desist Order

Staff also seeks a cease and desist order directing CableMax to cease and desist from further operations, as authorized in section 14(1)(d) of the Act. Since CableMax has violated the Act, since CableMax has not resolved outstanding customer complaints related to its discontinuance of service, since CableMax owes refunds to 87 customers, and since CableMax has no intention of operating further in Michigan, this PFD recommends that the Commission issue a cease and desist order directing CableMax to cease and desist from providing video services in Michigan. Should circumstances change and CableMax desire to operate as a video service provider in Michigan, CableMax would be required to petition the Commission and establish to the Commission's satisfaction that any fines assessed against the company have been paid, that restitution has been made to the 87 customers that prepaid for services not provided, and that CableMax is able to provide service in conformance with the Act.

c. Mssrs. Killinger and Wesley

Staff also requests that the Commission bar CableMax's two members, Matthew Killinger and Michael Wesley, from operating a video service provider in Michigan. Debarment of owners or operators of video service providers is not one of the remedies or penalties expressly identified in section 14. While the remedies and penalties listed in section 14 are not intended to be exclusive, a lifetime bar is an extreme remedy. In this case, the bar would be directed to an individual whose culpability has not directly been adjudicated on this record, and who was not notified in advance that debarment would be sought. Staff has not presented any analysis of the Commission's authority to order this relief under the Act, or under the circumstances presented in this case.

Instead, this PFD recommends that the Commission seek the assistance of the Michigan Attorney General to determine whether the owners or operators of CableMax can be held legally responsible for any fines assessed against the company, and any amounts owed to customers.

d. Refunds

Since it is undisputed that 87 customers are owed \$3,952.50, this PFD further recommends that the Commission direct CableMax to refund these monies. This relief is consistent with the direction in section 14 of the Act that "the commission shall order remedies and penalties to protect and make whole persons who have suffered damages as a result of the violation." By operating without the required franchises, CableMax was providing service unlawfully; it was taking money from its customers for a service it was not lawfully allowed to provide. It is therefore reasonable to conclude

that the \$3,952.50 in damages these customers suffered when their service was terminated resulted from CableMax's violations of the Act.

III.

CONCLUSION

For the reasons set forth above, this PFD concludes that CableMax was providing video services in violation of sections 2, 3 and 10 of the Uniform Video Services Local Franchise Act. This PFD recommends that the Commission assess a fine of \$500 for each of 30 violations of the Act as explained above, for a total fine of \$15,000, with \$1,000 to be waived if CableMax demonstrates that it has refunded monies to the 87 customers owed a total of \$3,952.20 within 30 days of the Commission's final order. In addition, this PFD recommends that the Commission order CableMax to repay the outstanding amounts owed to customers, and to cease and desist from further operations in Michigan. Finally, the Commission should clarify that any existing franchise agreements held by CableMax are rescinded.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman
Administrative Law Judge

Issued and Served: July 22, 2010